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The Widening Exception to the Warrant Requirement in the Area of Administrative Searches: New York v. Burger

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The Widening Exception to the Warrant Requirement in the Area of Administrative Searches: *New York v. Burger*[1] — In the 1987 case of *New York v. Burger*, the United States Supreme Court substantially extended the previously narrow closely regulated business exception to the fourth amendment warrant requirement.[2] This exception permits warrantless administrative searches of certain closely regulated businesses and industries.[3] Prior to *New York v. Burger*, this exception existed only for three heavily regulated industries: the mining industry, the firearm industry, and the liquor industry.[4] The Supreme Court in *New York v. Burger* significantly expanded this exception to now encompass the automobile dismantling industry.[5] The Supreme Court's holding in this case, according to Justice Brennan's strongly worded dissent, signifies a major move away from the warrant requirement in the realm of administrative searches.[6] The ultimate effect of this move is a disintegration of fourth amendment protections for owners and operators of commercial enterprises.[7]

The first clause of the fourth amendment prohibits "unreasonable searches and seizures."[8] The second clause of the fourth amendment states that "no Warrants shall issue, but upon probable cause."[9] Traditionally, the Supreme Court has read the reasonableness clause and the warrant clause together, thereby establishing that the fourth amendment requires a warrant in order to conduct a reasonable search.[10] In the realm of criminal searches, however, the Supreme Court has recognized many exceptions to the warrant requirement, thereby allowing myriad warrantless searches to be reasonable within the meaning of the fourth amendment.[11]

In the area of administrative searches, the Supreme Court has recognized a specific exception to the warrant requirement which is known as the "closely regulated business exception."[12] In essence, this exception permits warrantless searches to be reasonable within the meaning of the fourth amendment upon two conditions.[13] First, the business

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[1] 107 S. Ct. 2636 (1987).

[2] *See id.* at 2648–49.

[3] *Id.*

[4] *Id.* at 2642–43; *see* Donovan v. Dewey, 452 U.S. 594 (1981) (mining industry); United States v. Biswell, 406 U.S. 311 (1972) (firearm industry); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry).

[5] 107 S. Ct. at 2646.

[6] *Id.* at 2652 (Brennan, J., dissenting).

[7] *Id.*

[8] U.S. CONST. amend. IV.

[9] *Id.*

[10] *See* See v. City of Seattle, 387 U.S. 541, 546 (1967).

[11] *See, e.g.*, Chimel v. California, 395 U.S. 752, 766, 768 (1969) (a warrantless search incident to arrest is permissible); Warden v. Hayden, 387 U.S. 294, 298–300 (1967) (warrantless search justified by exigent circumstances of hot pursuit is permissible); Carroll v. United States, 267 U.S. 132, 153 (1925) (no warrant required to stop and search an automobile); *see also*, Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985).

[12] *Burger*, 107 S. Ct. at 2643. *See generally* W. LAFAVE, SEARCH AND SEIZURE § 10.2 (1987); Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856 (1979); Note, *Administrative Agency Searches Since* Marshall v. Barlow's, Inc.: *Probable Cause Requirements for Nonroutine Administrative Searches*, 70 GEO. L.J. 1183 (1982) [hereinafter Note, *Administrative Agency Searches Since* Marshall v. Barlow's, Inc.]; Note, *Entries and Searches in the Administrative Setting*, 53 GEO. WASH. L. REV. 230 (1984–1985); Note, *Constitutional Law — Warrantless Administrative Searches and the Two-Step Test of* Donovan v. Dewey, 56 TUL. L. REV. 1467 (1982).

[13] *See Burger*, 107 S. Ct. at 2643–44.

must be part of a closely or pervasively regulated industry.[14] Second, the warrantless search must be conducted pursuant to a regulatory scheme that satisfies the Supreme Court's three-part reasonableness test.[15] The first prong of the test requires that the state have a substantial government interest in regulating the industry.[16] The second prong of the test requires that the regulation of the industry furthers this substantial government interest,[17] and that the warrantless administrative search is necessary to advance the state's regulatory scheme.[18] The third prong of the test requires that the statute provide an adequate substitute for a warrant.[19] Therefore, when the Supreme Court classifies a business as closely regulated, the warrant clause no longer applies; the reasonableness clause, however, still applies.[20]

The case of *New York v. Burger* began in November 1982 when five police officers entered Joseph Burger's junkyard in Brooklyn, New York.[21] Joseph Burger is a vehicle dismantler, and the officers were at the junkyard to conduct an administrative search pursuant to section 415-a5 of the New York vehicle and traffic laws.[22] Section 415-a applies to vehicle dismantlers and junkyard owners in the state of New York.[23] This statute requires vehicle dismantlers and junkyard owners to keep certain records.[24] Section 415-a5 also permits police officers to inspect these records, and any vehicles subject to the record keeping requirements, without a warrant.[25] The officers asked

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[14] *Id.*

[15] *Id.*

[16] *Id.* at 2644.

[17] *See id.*

[18] *Id.*

[19] *Id.*

[20] *See id.* at 2643.

[21] *Id.* at 2639.

[22] *Id.* The statute involved was N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986). This statute reads in relevant part:

> Records and Identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner [of the Department of Motor Vehicles] or which would be eligible to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession .... Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises .... The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.

Id.

[23] N.Y. VEH. & TRAF. LAW § 415-a1 (McKinney 1986) (definition and registration of vehicle dismantlers). A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. *Id.* No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section. *Id.* A violation of this subdivision shall be a class E felony. *Id.*

[24] See *supra* note 22 for the text of the statute.

[25] See *supra* note 22 for the text of the statute.

Burger to show them his license[26] and his police book.[27] Burger told the police officers that he did not have these documents.[28]

The officers then informed Burger that they would conduct a warrantless inspection pursuant to section 415-a5.[29] Burger did not object.[30] The officers, in accordance with their usual practice, copied down the Vehicle Inspection Numbers (VINs) of some of the vehicles and parts of vehicles in the junkyard.[31] When the police officers checked these numbers against a police computer, they determined that Burger was in possession of stolen vehicles and parts.[32] Burger was arrested and charged with five counts of possession of stolen property, and one count of unregistered operation as a vehicle dismantler in violation of the statute.[33]

At trial in the Kings County Supreme Court, Burger moved to suppress the evidence obtained during the inspection, principally arguing that the regulatory statute was unconstitutional[34] because it permitted warrantless searches in violation of the fourth amendment.[35] The trial court denied the motion, ruling that the junkyard business was a "pervasively regulated" industry.[36] Therefore, the trial court reasoned, a warrantless administrative inspection conducted pursuant to a statute that was properly limited in "time, place and scope" was permissible.[37] Moreover, the trial court held that when the officers obtained information giving them reasonable cause to believe that some vehicles and parts were stolen, they did not need a warrant before arresting Burger and seizing the property.[38] The Appellate Division affirmed for the same reasons.[39]

The New York Court of Appeals reversed the Appellate Division on the basis that the statute authorized searches to uncover criminal activity, and not to enforce a comprehensive regulatory scheme.[40] Therefore, the court of appeals held that the statute was unconstitutional because it permitted warrantless searches for evidence of crimes in violation of the fourth amendment.[41] The Supreme Court granted certiorari because of the important state interest involved.[42]

The Supreme Court, in a six to three decision, reversed the New York Court of Appeals.[43] The Supreme Court held that the warrantless administrative search of the automobile junkyard, conducted pursuant to section 415-a5 which authorized the search,

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[26] *Burger*, 107 S. Ct. at 2639.

[27] *Id.* at 2039–40. A police book is a record of all the vehicles and parts coming into the possession of a vehicle dismantler and the disposition thereof. *See* N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986).

[28] *Burger*, 107 S. Ct. at 2640.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* People v. Burger, 67 N.Y.2d 338, 342, 493 N.E.2d 926, 928 (1986).

[36] *Burger*, 107 S. Ct. at 2640.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 2641.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 2652.

was reasonable within the meaning of the fourth amendment because it fell within an exception to the warrant requirement.[44] An exception to the general warrant requirement exists for administrative searches of closely regulated industries.[45]

The Supreme Court in *Burger* concluded that vehicle dismantling is a closely regulated business in New York.[46] The Court noted the quantity of regulations governing automobile dismantling in New York.[47] An operator in this industry must obtain a license, pay a fee, maintain a police book, and have all records and inventory available for inspection by the police.[48] In addition, the Court reasoned that because the automobile dismantling industry was very similar to the closely regulated general junkyard industry, it was, by association, also closely regulated.[49] Traditionally, the Court has required that a business have a long history of government oversight in order to qualify as a closely regulated business.[50] The *Burger* Court, however, stated that because vehicle dismantling was a relatively young industry, a long history was not possible.[51] The Court then imputed the general junkyard industry's long history of regulation to the automobile dismantling industry because of the similarities between the two industries.[52] Therefore, because of the vehicle dismantling industry's own regulation, and its association with a long regulated industry, the Court held that the automobile dismantling industry was closely regulated.[53]

After determining that the vehicle dismantling industry was a closely regulated industry, the *Burger* Court analyzed the regulatory statute permitting the warrantless search and held that it satisfied the Court's three-part test.[54] Therefore, the Court held that the search was reasonable within the meaning of the fourth amendment.[55] The Court ruled that the regulatory scheme satisfied the first prong of the three-part test because the state has a substantial interest in reducing car theft, and vehicle dismantlers provide a major market for stolen cars.[56] The Court held that the statute passed the second prong of the test because a state may reasonably believe that requiring vehicle dismantlers to register and to keep records may inhibit their role in the traffic of stolen vehicles.[57] The Court also concluded that warrantless searches were necessary because of the need for frequent and unannounced inspections.[58] The Court ruled that the

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[44] *Id.* at 2648–49.

[45] *Id.*

[46] *Id.* at 2644.

[47] *Id.* at 2644–45.

[48] *Id.*

[49] *Id.* at 2646.

[50] *See id.* at 2645.

[51] *Id.* The Supreme Court in *Burger* stated that because of the relatively recent phenomenon of the widespread use of automobiles in our society, automobile junkyards and vehicle dismantlers have not existed for very long and therefore do not have a long history of government regulation. *Id.* Furthermore, the Court stated, this industry did not even attract government attention until the 1950s when used automobiles were no longer easily reabsorbed into the steel industry and attention turned to the problems concerning discarded automobiles and motor vehicle parts. *Id.*

[52] *Id.* at 2646.

[53] *Id.*

[54] *Id.* at 2646–48.

[55] *Id.* at 2646.

[56] *Id.* at 2647.

[57] *Id.*

[58] *Id.* at 2648.

statute satisfied the third prong of the test by providing an adequate substitute for a warrant.[59] The Court held that the statute provided an adequate substitute for a warrant because it placed a business owner on notice that periodic inspections could occur, and it sufficiently limited the discretion of the inspecting officers.[60] Therefore, the *Burger* Court held that the warrantless administrative search did not violate the fourth amendment because it found that Burger's automobile dismantling business was part of a closely regulated industry, and that the search was conducted pursuant to a statute that satisfied the Court's three-part reasonableness test.[61]

Justice Brennan, joined by Justices Marshall and O'Connor, dissented.[62] Justice Brennan argued that the vehicle dismantling industry was not a closely regulated industry and, therefore, the police needed an administrative warrant to search the commercial premises.[63] Justice Brennan emphasized that if the mere requirement of a filing fee and a license were sufficient to place a commercial business into a closely regulated business category, few businesses could ever escape this label.[64] Therefore, he concluded, fourth amendment protections for commercial businesses would be almost non-existent in the area of administrative searches.[65]

Justice Brennan further asserted that even if vehicle dismantling were a closely regulated industry, this search violated the fourth amendment.[66] Justice Brennan argued that the search was unconstitutional because section 415-a did not create a "predictable and guided [governmental] presence" so as to provide an adequate substitute for a warrant, and thus failed the third prong of the Court's reasonableness test.[67] Therefore, Justice Brennan argued, because the vehicle dismantling industry was not closely regulated, and because the statute did not satisfy the third prong of the Court's reasonableness test, the warrantless search was not reasonable within the meaning of the fourth amendment.[68] Furthermore, Justice Brennan argued, the regulatory statute was fundamentally flawed because it permitted warrantless searches intended solely to uncover evidence of criminal acts.[69] Thus, Justice Brennan asserted that the warrantless search was in violation of the fourth amendment.[70]

New York v. Burger represents a significant and dangerous move in the direction of making a warrant requirement the exception to the rule in the area of administrative searches.[71] If a filing fee, a license requirement, and the obligation to maintain records

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[59] *See id.*

[60] *See id.*

[61] *See id.* at 2646.

[62] *Id.* at 2652 (Brennan, J., dissenting). Justice O'Connor joined in the dissent in all but Part III, in which Justice Brennan contended that the fundamental defect of the statute was that it authorized criminal searches. *Id.* at 2655–57 (Brennan, J., dissenting). Justice O'Connor agreed that the vehicle dismantling industry was not closely regulated and that even if it were, the search violated the fourth amendment because the statute did not provide an adequate substitute for a warrant. *Id.* at 2652–55 (Brennan, J., dissenting).

[63] *Id.* at 2652 (Brennan, J., dissenting).

[64] *Id.* at 2653 (Brennan, J., dissenting).

[65] *Id.* at 2657 (Brennan, J., dissenting).

[66] *Id.* at 2654 (Brennan, J., dissenting).

[67] *See id.* (quoting Donovan v. Dewey, 452 U.S. 593, 604 (1981)).

[68] *Id.* at 2652, 2654 (Brennan, J., dissenting).

[69] *Id.* at 2655 (Brennan, J., dissenting).

[70] *Id.* at 2656 (Brennan, J., dissenting).

[71] *See id.* at 2652 (Brennan, J., dissenting).

are sufficient to establish the existence of a "closely regulated" industry, very few businesses or industries could escape this classification.[72] The Supreme Court in *New York v. Burger* reaffirmed the rule that once an industry has been classified as a part of a closely regulated industry, the regulatory scheme must pass a reasonableness test before a warrantless search will be found to be reasonable within the meaning of the fourth amendment.[73] The relative ease, however, with which the regulatory scheme in *New York v. Burger* passed this test indicates an end to the general rule that a warrant is required for administrative searches of commercial property.[74]

The Supreme Court's holding in *New York v. Burger* signals the virtual elimination of fourth amendment protections for owners and operators of commercial businesses in the realm of administrative searches.[75] Section I of this casenote examines the development of the closely regulated business exception to the general warrant requirement for administrative searches.[76] Section II presents the Supreme Court's opinion in *New York v. Burger*, including the dissenting opinion.[77] Section III critically analyzes the Supreme Court's reasoning in the majority opinion and Justice Brennan's reasoning in his dissenting opinion.[78] Finally, Section III concludes that the Supreme Court, through its decision in *New York v. Burger*, has moved dangerously close to the elimination of fourth amendment protections for owners of commercial businesses in the area of administrative searches.[79]

I. Development of the Closely Regulated Business Exception

The fourth amendment of the Constitution establishes the right of people to be secure against "unreasonable search and seizure" and sets forth that "no Warrants shall issue but upon probable cause."[80] The basic purpose of the fourth amendment is to safeguard the privacy and security of individuals by preventing officers from exercising unbridled discretion or arbitrarily invading their privacy.[81] The fourth amendment is enforceable against the states through the fourteenth amendment.[82] Traditionally, the Supreme Court has read the two clauses of the fourth amendment, the warrant clause and the reasonableness clause, together, thereby establishing that warrantless searches are *per se* unreasonable.[83] Accordingly, the general rule is that a warrant, issued by a neutral and detached magistrate and based upon a showing of probable cause, is necessary before a search will be reasonable within the meaning of the fourth amendment.[84] If a search is not reasonable within the meaning of the fourth amendment, the exclusionary rule forbids the introduction of the evidence obtained in the search in both state

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[72] *Id.* at 2653 (Brennan, J., dissenting).
[73] *See id.* at 2642–44.
[74] *See id.* at 2652 (Brennan, J., dissenting).
[75] *Id.*
[76] *See infra* notes 80–200 and accompanying text.
[77] *See infra* notes 201–273 and accompanying text.
[78] *See infra* notes 274–361 and accompanying text.
[79] *Id.*
[80] U.S. Const. amend. IV.
[81] Camara v. Municipal Court, 387 U.S. 523, 528 (1967).
[82] *Id.*
[83] *See* See v. City of Seattle, 387 U.S. 541, 546 (1967).
[84] Steagald v. United States, 451 U.S. 204, 213 (1981).

and federal courts.[85] The warrant requirement is applicable to both criminal and administrative searches.[86]

There is an essential difference between a criminal search and an administrative search, and that difference is in what the search is intended to uncover.[87] A criminal search is intended to uncover evidence of violations of the penal code, whereas an administrative search is intended to assure conformity, or discover nonconformity, with regulatory statutes.[88] These regulatory statutes often involve licensing, record-keeping, or health and safety issues.[89] There is, however, a crucial link that is possible between these two types of searches. If evidence of criminal activity is discovered in the process of a valid administrative search, the evidence may be seized under the plain view doctrine.[90] The plain view doctrine establishes that if in the course of a valid search, evidence of illegal activity is visible, the evidence may be legally seized.[91]

Although warrants are generally required for both criminal and administrative searches, the standards for obtaining a warrant differ.[92] Warrants for criminal searches must be based upon a showing of probable cause.[93] Probable cause exists when "the facts and the circumstances within . . . [the officers'] knowledge and of which they have trustworthy information are sufficient in themselves to warrant a man of reasonable caution . . . [to believe] that an offense has been or is being committed."[94] Warrants for administrative searches may be based upon less than probable cause.[95] Warrants for administrative searches may be based upon a showing that reasonable administrative standards for conducting an inspection have been satisfied with respect to a particular dwelling or business establishment.[96] However, no specific knowledge of any regulatory code violation is necessary.[97]

The rationale for having the lower standard for administrative searches is based upon the purpose of these searches. Administrative searches provide a means to enforce city-wide compliance with municipal codes.[98] These codes often concern health, licensing, record-keeping, or safety issues.[99] Because police officers usually do not have specific information concerning code violations with respect to a particular building or dwelling, the officers would rarely have sufficient information to meet the probable cause standard.[100] Therefore, according to the Supreme Court, if traditional probable cause were the standard for administrative searches, few code-enforcement inspections could take

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[85] Mapp v. Ohio, 367 U.S. 643, 648, 655 (1961).

[86] *See Camara*, 387 U.S. at 534, 535.

[87] *Id.* at 534–35.

[88] *See id.* at 535.

[89] *See id.*

[90] Michigan v. Clifford, 464 U.S. 287, 294 (1984).

[91] *Id.*

[92] *See Camara*, 387 U.S. at 534–38.

[93] *Id.* at 535.

[94] Note, *Administrative Agency Searches Since* Marshall v. Barlow's, Inc., *supra* note 12, at 1186 n.15 (1982) (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).

[95] *See Camara*, 387 U.S. at 538.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 535.

[99] *See id.*

[100] *Id.* at 536, 537.

place.[101] This, in turn, would significantly weaken the government's ability to prevent or abate conditions that may be hazardous to public health and safety.[102] The lesser standard of probable cause for administrative searches is further justified in that these searches are not intended to uncover evidence of crimes, nor are they personal in nature, and, thus, they involve a fairly limited invasion into a person's privacy.[103]

Although warrants are generally required for administrative searches, there is a specific exception to the warrant requirement for searches of closely regulated businesses.[104] The rationale underlying this exception to the warrant requirement is based upon the notion of privacy expectations.[105] In theory, an owner of a business in a heavily regulated industry has a lessened expectation of privacy and has, in a sense, agreed to voluntarily subject himself or herself to government inspections.[106] Therefore, where the privacy expectations of the owner of a business are weakened, and the state interests in regulating a particular industry are concomitantly heightened, a warrantless administrative inspection of the business may be constitutionally permissible.[107] Notwithstanding the closely regulated business exception to the warrant requirement, the general rule remains that a warrant is required for a search to be constitutionally permissible.[108]

Warrants were not always required for administrative searches.[109] In 1959, the Supreme Court in *Frank v. Maryland* held that a warrantless administrative search did not violate the fourth amendment.[110] In *Frank*, a health department official conducted a warrantless administrative search of a private home pursuant to a municipal building code regulation that permitted such searches.[111] The *Frank* Court based its decision on the ground that fourth amendment protections applied only to searches for evidence of criminal activity.[112] The Court concluded that because the inspection in *Frank v. Maryland* was not to uncover evidence of criminal activity, it touched only at the periphery of fourth amendment protections.[113] Thus, the warrantless inspection, conducted pursuant to municipal building code regulations, did not violate the fourth amendment.[114]

In 1967, the Supreme Court in *Camara v. Municipal Court* overturned *Frank v. Maryland*.[115] The *Camara* Court stated that the fourth amendment privacy interests at stake during municipal fire, health, and housing inspections are not merely peripheral.[116]

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[101] *See id.* at 537.

[102] *See id.* at 536, 537.

[103] *See id.* at 537.

[104] *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981) (no warrant necessary for administrative search of a mining organization); United States v. Biswell, 406 U.S. 311 (1972) (no warrant necessary for administrative search of a business dealing in firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (no warrant necessary for administrative search of liquor dealer's business).

[105] *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 600 (1981); Marshall v. Barlow's Inc., 436 U.S. 307, 313 (1978); United States v. Biswell, 406 U.S. 311, 316 (1972).

[106] *Marshall*, 436 U.S. at 313.

[107] *Burger*, 107 S. Ct. at 2643.

[108] *See Camara*, 387 U.S. at 528–29.

[109] Frank v. Maryland, 359 U.S. 360, 373 (1959).

[110] *Id.*

[111] *Id.* at 361.

[112] *See id.* at 365, 367.

[113] *Id.* at 367.

[114] *See id.*

[115] *Camara*, 387 U.S. at 534.

[116] *Id.*

The issue in *Camara* was whether a city housing inspector could conduct a warrantless inspection of a home pursuant to a housing ordinance.[117] The *Camara* Court held that administrative health, fire, and housing inspections, authorized and conducted without a warrant, were significant intrusions upon privacy interests protected by the fourth amendment.[118] The Court reaffirmed the traditional notion that a warrant is necessary to circumscribe the discretion of officers and thereby safeguard the privacy and security of individuals against arbitrary invasions by government officials.[119] Elucidating the rationale behind the fourth amendment, Justice White, writing for the Court in *Camara*, stated:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[120]

Camara v. Municipal Court stands for the proposition that a warrant is required prior to administrative searches of private residences.[121] The *Camara* Court, however, indicated that because most people will allow an inspection without a warrant, warrants should normally be sought only after entry is refused.[122] A magistrate may issue a warrant for an administrative search upon less than the usual level of probable cause necessary for a criminal search warrant.[123] The Supreme Court stated in *Camara* that a magistrate may issue an an administrative search warrant if the proposed inspection complies with "reasonable legislative or administrative standards."[124] These standards, the Court stated, may refer to the nature of the building, or the condition of the entire area, but they do not need to depend upon specific information concerning the condition of a particular building.[125] Commentators have noted that magistrates issue administrative search warrants if procedures are followed to ensure against an arbitrary selection of homes or businesses.[126]

The warrant requirement, held to apply to administrative searches of private residences in *Camara*, was extended to administrative searches of businesses in the 1967 case of *See v. City of Seattle*.[127] In *See*, the issue was whether a representative of the Seattle Fire Department needed an administrative warrant prior to conducting an administrative search as part of a routine city-wide canvas to ensure compliance with the fire code.[128] The Court in *See* stated that "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable entries upon his

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[117] *Id.* at 525.
[118] *Id.* at 534.
[119] *Id.* at 528.
[120] *Id.* at 529.
[121] *See id.* at 534.
[122] *Id.* at 539–40.
[123] 3 W. LAFAVE, *supra* note 12, § 10.2, at 631.
[124] *Camara*, 387 U.S. at 538.
[125] *Id.*
[126] *See, e.g.*, W. LAFAVE, CRIMINAL PROCEDURE § 3.9, at 188 (1985).
[127] 387 U.S. 541, 546 (1967). *See* was the companion case to Camara v. Municipal Court. *Id.* at 542.
[128] *Id.* at 541.

private commercial property."[129] The *See* Court noted both the rapid increase of governmental regulations of businesses, and the need to inspect commercial businesses to enforce such regulatory laws.[130] The *See* Court held, however, that "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises."[131] The *See* Court implied that the *Camara* Court's assertion that inspectors should generally seek warrants only after entry is refused does not apply to business inspections "since surprise may be a crucial aspect of routine inspections of business establishments . . . ."[132]

In 1970, the Supreme Court created an exception to the general warrant requirement for administrative searches.[133] In *Colonnade Catering Corp. v. United States*, the Court held that a federal statute authorizing a warrantless administrative search of the business premises of a federally licensed liquor dealer did not violate the fourth amendment.[134] The Court reasoned that the liquor industry was a "closely regulated" industry[135] and had long been subject to close supervision and inspection.[136] The Court deferred to Congress' broad authority to fashion standards of reasonableness in searches and seizures.[137] The *Colonnade* Court noted the long history of government regulations, dating back to 1692, permitting warrantless searches of liquor establishments and concluded that such searches were reasonable within the meaning of the fourth amendment.[138]

Two years later, in 1972, the Supreme Court extended this closely regulated business exception to the firearm industry.[139] In *United States v. Biswell*, the Court held that the warrantless search of a federally licensed gun dealer's locked storeroom, as part of a federally authorized inspection procedure,[140] was reasonable within the meaning of the fourth amendment.[141] The Court in *Biswell* reasoned that although federal regulation of the firearm industry was not as "deeply rooted in history" as governmental regulation of the liquor industry,[142] it was important in the prevention of violent crimes and in the control of the interstate traffic in firearms.[143] The Court stated that the situation in *Biswell* was distinctly different from the situation in *See v. City of Seattle*.[144] The Court reasoned that building code violations, which were at issue in *See*, are difficult to conceal

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[129] *Id.* at 543.

[130] *Id.* at 543–44.

[131] *Id.* at 544.

[132] *Id.* at 545 n.6.

[133] Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

[134] *Id.* Section 5146(b) of the United States Code provides:

> The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U.S.C. § 5146(b) (1954).

[135] *Id.* at 74.

[136] *Id.* at 75.

[137] *Id.* at 77.

[138] *Id.* at 75, 77.

[139] United States v. Biswell, 406 U.S. 311, 317 (1972).

[140] *Id.* at 312.

[141] *Id.* at 317.

[142] *Id.* at 315.

[143] *Id.*

[144] *Id.* at 316.

or correct quickly, and, therefore, the warrant requirement would not frustrate enforcement efforts.[145] Firearms and ammunition, however, could be hidden or disposed of quickly. Therefore, the Court in *Biswell* stated that frequent and unannounced inspections were necessary for inspections to be effective and serve to deter unlawful practices.[146] Therefore, the Court reasoned, a warrant requirement could frustrate inspections.[147]

The Court in *Biswell* held that the warrantless inspection was reasonable within the meaning of the fourth amendment because the regulatory inspections furthered urgent federal interests,[148] and because the statute was "carefully limited in time, place and scope."[149] The Court stated that such warrantless inspections created only slight threats to the dealer's justifiable expectations of privacy because the gun dealer had chosen to engage in a pervasively regulated business and to accept a federal license.[150] Thus, the Court concluded, the dealer was aware that his or her business records, firearms and ammunition would be subject to inspection under the Gun Control Act of 1968.[151] The theory, set forth in *Colonnade* and *Biswell*, that individuals with businesses that are part of closely regulated industries have a lessened expectation of privacy is known as the *Colonnade-Biswell* doctrine.[152]

In 1978, the Supreme Court checked this move in the direction of allowing warrantless administrative searches.[153] In the 1978 case of *Marshall v. Barlow's, Inc.*, the Court held that a warrantless administrative search of an electrical and plumbing installation business, conducted pursuant to the Occupational Safety and Health Act of 1970 (OSHA), violated the fourth amendment.[154] The Supreme Court distinguished *Marshall* from *Colonnade* and *Biswell*, finding that the statute in *Marshall* failed to tailor the scope and frequency of the administrative searches to the specific health and safety concerns

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[145] *Id.*

[146] *Id.*

[147] *Id.* The Court's argument that a warrant requirement would destroy the effectiveness of the inspections seems to be based on the *Camara* Court's notion that an administrative search warrant should only be sought when entry has been refused. The Court in *See*, however, intimated that this notion does not necessarily apply to inspections of businesses due to the need to retain the surprise element. *See See*, 387 U.S. at 545 n.6.

[148] 406 U.S. at 317.

[149] *Id.* at 315.

[150] *Id.* at 316.

[151] *Id.* Section 923(g) of the Gun Control Act of 1968 authorizes official entry during business hours into "the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises." *Biswell*, 406 U.S. at 311 (quoting 18 U.S.C. § 923(g) (1982)).

[152] New York v. Burger, 107 S. Ct. at 2643.

[153] *Marshall*, 436 U.S. at 324.

[154] *Id.* Section 8(a) of the Occupational Safety and Health Act of 1970 authorizes the Secretary of Labor, upon presenting his credentials to the owner, operator, or agent in charge:

> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

29 U.S.C. § 657(a) (1970).

presented by each of the numerous businesses regulated by the statute.[155] The *Marshall* Court stated that, unlike the statutes at issue in *Colonnade* and *Biswell*, OSHA regulated all businesses involved in interstate commerce.[156] Therefore, because OSHA was not specific to the industry in question, the Court held that it was insufficient, by itself, to bring the electrical and plumbing business within the closely regulated business exception to the warrant requirement.[157]

The Court in *Marshall* emphasized that *Colonnade* and *Biswell* were unique exceptions to the warrant requirement.[158] The *Marshall* Court also expressly reaffirmed that the lessened expectation of privacy that exists when an individual engages in a closely regulated industry is a central element to consider in evaluating the constitutionality of a warrantless search.[159] The *Marshall* Court stated that the distinguishing factor separating a closely regulated business from an ordinary business is that a closely regulated business has a long history of close governmental supervision of which any person entering the business must already be aware.[160] The Court reasoned that a person in a closely regulated industry, such as the liquor industry in *Colonnade* or the firearms industry in *Biswell*, has implicitly agreed to submit to the restrictions placed on him or her.[161] Therefore, stated the Court, such a person has a lessened expectation of privacy and a warrantless administrative search may be constitutionally permissible.[162] In *Marshall*, however, the Supreme Court held that because OSHA covers all businesses involved in interstate commerce, the business in question could not be considered closely regulated merely on the basis of OSHA.[163] Therefore, concluded the Court, the fourth amendment required that the inspector obtain a warrant prior to conducting any inspection of the business.[164]

Thus, the Supreme Court in *Marshall* reaffirmed the importance of a warrant in protecting individual privacy rights. A warrant, the Court noted, provides assurance that a neutral and detached judicial officer has determined that a search is reasonable under the Constitution, is permitted by statute, and is part of an administrative plan established with neutral criteria.[165] Moreover, stated the Court, a warrant advises a business owner, at the time of inspection, of the scope and objects of the search.[166]

The *Marshall* Court held that in order for a warrantless inspection to be reasonable, it had to be necessary to the accomplishment of the administrative goals.[167] The *Marshall*

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[155] *Marshall*, 436 U.S. at 313–14.

[156] *See id.*

[157] *Id.*

[158] *Id.* at 313.

[159] *Id.*

[160] *Id.* The Court stated:

> Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.

Id.

[161] *Id.*

[162] *See id.*

[163] *Id.* at 313–14.

[164] *Id.* at 324.

[165] *Id.* at 323.

[166] *Id.*

[167] *See id.* at 316.

Court rejected the argument that warrantless inspections were necessary to the proper enforcement of OSHA in that they were conducted without prior notice and, thus, preserved the element of surprise.[168] The Court reasoned that even if an inspector were refused entry, the inspector would not necessarily lose the surprise element.[169] The Court stated that warrants may be issued *ex parte* and executed without delay and, thus, an inspector could retain the advantage of surprise that accompanies warrantless searches by simply reappearing unannounced at the business to be searched.[170] Although the Secretary of Labor had promulgated regulations requiring a special procedure if entry were denied, the *Marshall* Court stated that the Secretary has the authority instead to permit inspectors to obtain a warrant *ex parte* upon refusal of entry.[171] Furthermore, the Court indicated that inspectors could avoid the problem of having to return a second time with a warrant by simply regularly conducting inspections only after having obtained, *ex parte*, an administrative warrant.[172] In this manner, the element of surprise would never be lost.[173] The Court rejected the notion that requiring warrants to inspect commercial sites would impose a heavy burden on the courts or on the administrative inspection system.[174] Moreover, the Court stated that most businessmen would consent to an inspection without a warrant.[175] Thus, the *Marshall* Court concluded that warrantless administrative inspections were not necessary to further the regulatory scheme of OSHA, and, therefore, the Court held that the warrantless inspection was not reasonable within the meaning of the fourth amendment.[176]

In 1981, the Supreme Court reaffirmed the closely regulated business exception to the warrant requirement in *Donovan v. Dewey*.[177] In *Dewey*, the Court held that a warrantless inspection, conducted pursuant to the Federal Mine Safety and Health Act of 1977 (FMSHA), did not violate the fourth amendment.[178] The Supreme Court noted that the narrow exception to the warrant requirement had previously been limited to businesses with a long tradition of close government supervision.[179] The *Dewey* Court, however, stated that it is the pervasiveness and regularity of governmental supervision, and not merely the duration of regulation, which determines whether a warrant will be

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[168] *Id.*

[169] *Id.* at 319–20.

[170] *Id.*

[171] *Id.* at 320 n.15.

[172] *See id.* at 316, 317 n.12.

[173] *Id.* at 316.

[174] *Id.*

[175] *Id.* When an individual consents to an inspection, a warrant is not required. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

[176] *Marshall*, 436 U.S. at 316, 324.

[177] 452 U.S. 594, 606 (1981).

[178] *Id.* The Court explained that section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (1982), requires federal mine inspectors to inspect underground mines at least four times a year and surface mines at least twice a year to ensure compliance with the mandatory health and safety standards developed by the Secretary of Labor to govern the operation of United States mines. *Id.* at 596. This section, the Court stated, also requires federal mine inspectors to make repeated inspections to determine whether previously discovered violations have been corrected. *Id.* The Court further indicated that this section also grants inspectors "a right of entry to, upon, or through any coal or other mine," and states that "no advance notice of an inspection shall be provided to any person." *Id.* (quoting 30 U.S.C. § 813(a) (1982)).

[179] *Dewey*, 452 U.S. at 605–06.

required.[180] The Court reasoned that if only businesses with a long history of government regulation were subject to warrantless searches, absurd results would occur.[181] For example, all emerging industries, including the nuclear power industry, would be exempt from such searches.[182]

In *Dewey*, the Supreme Court established a two-part test to determine if a warrantless administrative search of a commercial property satisfied the reasonableness clause of the fourth amendment thereby making the search constitutionally permissible.[183] First, such an inspection would not violate the fourth amendment if Congress had reasonably determined that warrantless searches were needed in order to advance a regulatory scheme.[184] Second, the owner of a commercial property must have been unable to help being aware that his or her property would be inspected periodically for specific purposes based upon a well defined regulatory scheme.[185] The Court stated that this awareness occurs when a statute is specifically tailored to the particular problems of an industry.[186] Therefore, the Court determined the reasonableness, and thus the constitutionality, of the warrantless search on the basis of particular enforcement needs and the individual privacy protections of each statute.[187] Thus, according to the *Dewey* two-part test, warrantless administrative inspections of businesses violated the fourth amendment reasonableness clause if such inspections were "so random, infrequent, or unpredictable that the owner, for all practical purposes, ha[d] no real expectation that his property w[ould] from time to time be inspected by government officials."[188]

The Supreme Court distinguished *Dewey* from *Marshall* using the second prong of the two-part test.[189] This prong requires a statute to be sufficiently comprehensive and defined that an owner of a business can not help but be aware that his or her property will be subject to periodical inspections undertaken for specifically defined purposes.[190] The Supreme Court stated that unlike in *Marshall* where the statute in question, OSHA, was not specifically tailored to any clear industry, in *Dewey*, the statute, FMSHA, was specifically tailored to the safety and health issues associated with mines.[191] In addition, the Supreme Court noted that the Act at issue in *Marshall*, OSHA, did not provide any standards concerning the selection of businesses to be searched.[192] Conversely, the statute in *Dewey*, FMSHA, required inspection of all mines and specifically defined the frequency of inspections.[193] Therefore, FMSHA provided a constitutionally adequate substitute for a warrant, whereas OSHA did not.[194]

The Supreme Court's position on the issue of warrantless administrative searches of commercial businesses appeared stable following its 1981 decision in *Dewey*. The

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[180] *Id.*
[181] *Id.* at 606.
[182] *Id.*
[183] *Id.* at 600.
[184] *Id.*
[185] *Id.*
[186] *See id.* at 603.
[187] *Id.* at 601–02.
[188] *Id.* at 599.
[189] *See id.* at 600.
[190] *Id.*
[191] *Id.* at 603.
[192] *Id.* at 601.
[193] *Id.* at 603–04. See *supra* note 178 for a discussion of the Act's requirements.
[194] *See id.* at 603–04.

Court's stance was that an exception to the fourth amendment warrant requirement existed for administrative searches of closely regulated industries.[195] The Court narrowly defined the term "closely regulated" to include only those industries that either had a long history of governmental regulation, or were pervasively regulated at the present time.[196] Moreover, the Court stated that the searches must be reasonable within the meaning of the fourth amendment, and, to determine reasonableness, the Court established a two-part test.[197] The first prong of the test required that Congress had reasonably determined that warrantless searches were necessary to the enforcement of the regulation.[198] The second prong required that an owner of a business could not help but be aware that his or her property would be subject to periodic inspections based upon a well defined regulatory scheme.[199] The narrow exception to the warrant requirement in the area of administrative searches was considerably extended in the 1987 case of *New York v. Burger*.[200]

II. *New York v. Burger*: The Court's Analysis and Holding

In the 1987 case of *New York v. Burger*, the Supreme Court expanded the previously narrow closely regulated business exception to the warrant requirement to include the automobile dismantling business.[201] Prior to *New York v. Burger*, the only industries held by the Supreme Court to be closely regulated were the liquor industry (*Colonnade*),[202] the firearm industry (*Biswell*),[203] and the mining industry (*Dewey*).[204] In addition to extending the boundaries of the closely regulated business exception, the Court reformulated the two-part reasonableness test established in *Dewey* and set forth a three-part test for determining when a warrantless administrative search is constitutionally permissible under the fourth amendment.[205] The first prong of the test requires that the state have a substantial interest in regulating the industry.[206] The second prong requires that the regulation of the industry serve the state's substantial interest, and that warrantless inspections are necessary to further the regulatory scheme.[207] The third and final prong requires that the statute provide a constitutionally adequate substitute for a warrant.[208]

The Court in *Burger* held that the warrantless administrative search, conducted pursuant to section 415-a5 of the New York vehicle and traffic laws,[209] passed the three-part test, making the search reasonable within the meaning of the fourth amendment.[210] First, the state had a "substantial interest" in regulating this industry due to increased

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[195] *Id.* at 600.
[196] *Id.* at 599–600.
[197] *Id.* at 598.
[198] *Id.* at 600.
[199] *Id.*
[200] 107 S. Ct. 2636, 2652 (Brennan, J., dissenting).
[201] *Id.* at 2644.
[202] See *supra* notes 133–138 and accompanying text for a discussion of *Colonnade*.
[203] See *supra* notes 139–151 and accompanying text for a discussion of *Biswell*.
[204] See *supra* notes 177–194 and accompanying text for a discussion of *Dewey*.
[205] *Burger*, 107 S. Ct. at 2643–44.
[206] *Id.* at 2644.
[207] *Id.*
[208] *Id.*
[209] *Id.* at 2639 n.1. See *supra* note 22 for the text of the statute.
[210] *Id.* at 2646.

motor vehicle theft in New York.[211] Second, the regulation of the industry served the state's substantial interest in reducing car theft, and warrantless searches are necessary for furthering the regulatory scheme.[212] Third, the statute provided an adequate substitute for a warrant.[213]

A. *The Majority Opinion*

Justice Blackmun, writing for the Supreme Court in *New York v. Burger*, addressed the issue of whether a warrantless administrative search, conducted pursuant to a New York statute, was reasonable within the meaning of the fourth amendment.[214] Justice Blackmun began his analysis by reaffirming that the fourth amendment's prohibition against unreasonable searches and seizures applies to commercial premises as well as to private homes.[215] Therefore, the Court stated that the owner of a business has a reasonable expectation of privacy with respect to traditional police searches for criminal evidence, and also with respect to administrative inspections whose purpose is to enforce regulatory statutes.[216] The Court, however, upheld the *Colonnade-Biswell* doctrine which states that an owner of a business in a closely regulated industry necessarily has a lessened expectation of privacy.[217]

Because owners of businesses that are closely regulated have a reduced expectation of privacy, the warrant requirement, which establishes the reasonableness of a government search under the fourth amendment, is less stringent.[218] The Supreme Court in *Burger* stated that when an owner's privacy interests are very weak, and the government's interests in regulating a specific industry are very strong, a warrantless administrative search of the commercial establishment may be constitutionally permissible under the fourth amendment.[219] Such searches will be valid, however, only for closely regulated industries, and only if the search passes the newly articulated three-part test.[220]

The Court began its analysis of the reasonableness of the warrantless search by ruling that the vehicle dismantling business was a closely regulated business in the state of New York.[221] In support of this ruling, the Court found that there were extensive regulations covering this business. First, an operator must obtain a license, which means that the operator must meet the registration requirements and pay a fee.[222] Second, the operator must maintain a police book and record the purchase and sale of motor vehicles and vehicle parts, and must make these documents and vehicles available to police officers or Department of Motor Vehicle agents for inspection.[223] Third, the operator must visibly display the registration number at the place of business, on business documentation, and on all vehicles and parts that are part of the business inventory.[224]

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[211] *Id.* at 2646–47.
[212] *Id.* at 2647–48.
[213] *Id.* at 2648.
[214] *Id.* at 2639.
[215] *Id.* at 2642.
[216] *Id.*
[217] *Id.* at 2643.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 2643–44.
[221] *Id.* at 2644.
[222] *Id.* at 2644–45.
[223] *Id.* at 2645.
[224] *Id.*

The *Burger* Court reasoned that although it had previously emphasized the importance of the duration of a particular regulatory scheme in determining whether an industry was closely regulated, duration was not dispositive.[225] The Court noted that the automobile dismantling business had not been in existence very long and therefore did not have a long history of government regulation.[226] The Court reasoned that this absence of a long history of regulation was not determinative because the automobile dismantling industry was merely a new branch of another industry that had been closely regulated for years — the general junkyard and second-hand shop industry.[227] Therefore, the Court concluded, the automobile dismantling industry qualified, by association, as a closely regulated industry in which the operator had a reduced expectation of privacy.[228]

Once the Court determined that the automobile dismantling industry was closely regulated, the Court then examined the New York regulatory scheme to determine if it satisfied the three-part test necessary to make warrantless administrative inspections reasonable within the meaning of the fourth amendment.[229] First, the Court found that the state had a substantial interest in regulating the vehicle dismantling and automobile junkyard industry because of increased motor vehicle theft in New York and its link to this industry.[230] Second, the Court found that the regulation of this industry furthered the state's substantial interest in reducing automobile theft.[231] In reaching this determination, the Court found that requiring junkyard operators and vehicle dismantlers to keep records inhibits the traffic in stolen vehicles.[232] Furthermore, the Court reasoned, as it had in *Biswell*, that warrantless, frequent and unannounced inspections were necessary to enforce the regulatory scheme.[233]

Finally, the Supreme Court found that the New York regulatory scheme satisfied the third prong of the test by providing a constitutionally acceptable substitute for a warrant.[234] The Court found the statute to be an adequate substitute for a warrant because it informed the operator or owner of a vehicle dismantling business that regular inspections would occur.[235] Therefore, the operator knew that the inspection was not a discretionary act but was pursuant to a statute.[236] The Court reasoned that the time, place, and scope of the inspection, under this statute, were limited, thereby placing sufficient restraints on the discretion of the inspecting officers.[237]

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[225] *Id.*; *see supra* notes 133–138 and accompanying text.

[226] *Burger*, 107 S. Ct. at 2645.

[227] *Id.* at 2646.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 2646–47. Automobile junkyards and vehicle dismantlers provide a major market for stolen cars and car parts. *Id.* at 2647. Therefore, it is rational for a state to believe that it may be able to reduce car theft by establishing regulations that require record-keeping and, thus, help trace the origin and destination of vehicle parts. *Id.*

[231] *Id.* at 2647.

[232] *Id.* "It is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property." *Id.*

[233] *Id.* at 2647–48.

[234] *Id.* at 2648.

[235] *Id.*

[236] *Id.*

[237] *Id.*

The *Burger* Court rejected the New York Court of Appeals' holding that this statute was unconstitutional because it had no real administrative purpose, but was instead merely intended to provide police officers with a rapid method of enforcing criminal penalties for possession of stolen property.[238] The *Burger* Court reasoned that a state may address a major social problem, such as car theft, through both an administrative scheme and the penal code.[239] The Court also stated that although the ultimate purpose of the administrative scheme may be the same as the purpose of the penal laws (to reduce automobile theft), its regulatory goals are narrower.[240] Whereas penal laws seek to punish offenders, reasoned the Court, the administrative scheme does not aim to punish.[241] Instead, the administrative scheme seeks to ensure that vehicle dismantlers are legitimate licensed business persons who have satisfied the record-keeping requirements, thus permitting the police to identify stolen vehicles and parts passing through junkyards.[242] Therefore, the *Burger* Court concluded that an administrative scheme is not rendered unconstitutional simply because its broad purpose parallels the purpose of penal laws.[243] Moreover, the Supreme Court stated that the administrative scheme was not rendered unconstitutional merely because during the course of a valid administrative inspection, a police office may discover evidence of crimes in addition to violations of the administrative statute.[244] The Court here was simply reiterating the plain view doctrine which sets forth that during a valid search, criminal or administrative, a police officer may seize criminal evidence that is in plain view.[245]

B. *The Dissenting Opinion*

Justice Brennan, in his dissenting opinion in *Burger*, argued that the Court had rendered meaningless the general rule requiring warrants for administrative searches of commercial property.[246] The implications of the Court's opinion, argued Justice Brennan, if realized, would virtually end fourth amendment protections for owners of businesses in the realm of administrative searches.[247] Justice Brennan argued that the limited exception to the warrant requirement for searches of closely regulated industries was previously reserved for industries with a long history of close government regulation, or industries that involved inherent and immediate danger to health or life.[248] Justice Brennan contended that the Court's finding that vehicle dismantling was analogous to the long regulated general junk and secondhand shop industry was insufficient to establish Burger's vehicle dismantling business as being within a closely regulated industry.[249] Justice Brennan asserted that, although historical regulation is one factor in deciding whether an industry is closely regulated, it is the pervasiveness and regularity

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[238] *Id.* at 2649.

[239] *Id.*

[240] *Id.*

[241] *See id.*

[242] *Id.* at 2650.

[243] *See id.* at 2649.

[244] *Id.* at 2651.

[245] Michigan v. Clifford, 464 U.S. 287, 294 (1984).

[246] *Burger*, 107 S. Ct. at 2652 (Brennan, J., dissenting). Justice Brennan was joined in his dissent by Justice Marshall, and by Justice O'Connor in all but Part III. *Id.*

[247] *Id.* at 2657 (Brennan, J., dissenting).

[248] *Id.* at 2652 (Brennan, J., dissenting).

[249] *Id.* at 2652–53 (Brennan, J., dissenting).

of the regulation that ultimately determines whether a warrant is necessary for a search to be reasonable under the fourth amendment.[250]

Justice Brennan argued that neither the general junkyard industry nor the vehicle dismantling industry were or ever had been pervasively regulated because the regulatory requirements were minimal.[251] The only provisions that govern vehicle dismantling in New York, the dissent noted, merely require an owner to register and pay a fee, to display the registration visibly, to maintain a "police book," and to allow inspections.[252] Justice Brennan stated that the registration and record-keeping requirements could not be characterized as pervasive regulation.[253] These requirements, he noted, are imposed upon a vast number and variety of trades and businesses.[254] Justice Brennan stated, moreover, that for vehicle dismantlers, in sharp contrast to the mine operators in *Donovan v. Dewey*, no regulations governed the condition of the premises, the methods of operation, the business hours, or the equipment that was required to be used.[255] The quantity and specificity of the regulations governing mining, stated Justice Brennan, established that industry as closely regulated.[256] The opposite is true for the vehicle dismantling industry, argued Justice Brennan, where the regulations are too few and too general to establish it as closely regulated.[257]

Justice Brennan argued that if this minimal regulatory scheme qualified vehicle dismantling as a closely regulated business, very few businesses could escape being classified as closely regulated.[258] Therefore, Justice Brennan contended, the warrant requirement was effectively becoming the exception instead of the rule.[259] The general rule had been that a warrant must be issued before a search is constitutionally valid.[260] Justice Brennan then asserted that *See*, which established the warrant requirement for administrative searches of commercial businesses, had been "constructively overruled" by *Burger*.[261]

Justice Brennan further argued that even if vehicle dismantling were a closely regulated industry, the search in *Burger* violated the fourth amendment.[262] Justice Brennan asserted that the search violated the fourth amendment because the administrative statute in question did not satisfy the third prong of the Court's three-part test which requires a statute to provide an adequate substitute for a warrant.[263] To provide an adequate substitute for a warrant, Justice Brennan noted, an administrative statute must establish "a predictable and guided [governmental] presence."[264] Justice Brennan contended that the statute did not establish the necessary certainty and regularity of inspections needed to provide a constitutionally acceptable substitute for a warrant because,

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[250] *Id.* at 2653 (Brennan, J., dissenting).
[251] *Id.* at 2653 n.4. (Brennan, J., dissenting).
[252] *Id.* at 2653 (Brennan, J., dissenting).
[253] *Id.*
[254] *Id.*
[255] *Id.* at 2653 & n.6 (Brennan, J., dissenting); *see supra* notes 177–194 and accompanying text.
[256] *Burger*, 107 S. Ct. at 2653 & n.6 (Brennan, J., dissenting).
[257] *Id.* at 2652, 2653 (Brennan, J., dissenting).
[258] *Id.* at 2653 (Brennan, J., dissenting).
[259] *Id.* at 2653–54 (Brennan, J., dissenting).
[260] *Id.* at 2652 (Brennan, J., dissenting).
[261] *Id.* at 2653–54 (Brennan, J., dissenting).
[262] *Id.* at 2654 (Brennan, J., dissenting).
[263] *See id.*
[264] *Id.*

under the statute, a vehicle dismantler had no assurance that any inspections would ever take place.[265] Moreover, stated Justice Brennan, "neither the statute, nor any regulations, nor any regulatory body provide[d] limits or guidance on the selection of vehicle dismantlers for inspection."[266] Justice Brennan argued that it was precisely this lack of guidance concerning selection that caused the statutory scheme in *Marshall* to be declared unconstitutional.[267]

Once Burger had informed the police that he did not have an operating license or a police book, as required by section 415-a5, Justice Brennan asserted that he had violated every requirement of the administrative scheme.[268] Justice Brennan argued that the scope of the statute was exhausted once these administrative violations had been discovered and that no subsequent search should have taken place.[269] Thus, because there was no provision in the statute concerning possession of stolen vehicles, Justice Brennan argued that the subsequent search conducted at Burger's vehicle dismantling business could not possibly have uncovered any further violations of the statute.[270] Therefore, according to Justice Brennan, the police officers' subsequent search clearly was intended solely to uncover evidence of criminal activity.[271] Because this search could not have uncovered any administrative violations, Justice Brennan argued that it constituted a warrantless search for criminal activity in violation of the fourth amendment.[272] He argued that if the fourth amendment is to have any meaning in the realm of commercial businesses, it must prohibit searches for evidence of criminal acts even if those searches would also serve an administrative purpose, unless the searches are intended to uncover an administrative violation.[273]

III. Analysis of the Widening Exception to the Warrant Requirement in the Area of Administrative Searches

In *New York v. Burger*, the Supreme Court extended the previously narrow closely regulated business exception to the warrant requirement to encompass the automobile dismantling industry.[274] The *Burger* Court held that a warrantless administrative search of a vehicle dismantling business, conducted pursuant to section 415-a5 of the New York vehicle and traffic laws, was reasonable within the meaning of the fourth amendment.[275] First, the *Burger* Court ruled that the vehicle dismantling industry was a closely regulated industry in New York.[276] Second, the Court analyzed the regulatory scheme that permitted the warrantless search, section 415-a5, and determined that it satisfied the three-part test necessary to render the warrantless search reasonable under the fourth amendment.[277]

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[265] *Id.*
[266] *Id.*
[267] *Id.*; *see supra* notes 153–176 and accompanying text.
[268] *Id.* at 2656 (Brennan, J., dissenting); *see supra* note 22 and accompanying text.
[269] *See Burger*, 107 S. Ct. at 2656 (Brennan, J., dissenting).
[270] *Id.*
[271] *Id.*
[272] *Id.* at 2655 (Brennan, J., dissenting).
[273] *Id.* at 2657 (Brennan, J., dissenting).
[274] *Id.* at 2646.
[275] *Id.*
[276] *Id.*
[277] *Id.*

The first prong of the Court's three-part test requires the state to have a substantial interest in regulating the industry.[278] The second prong sets forth that the warrantless inspection must be necessary to further the regulatory scheme.[279] The third prong establishes that the statutory inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.[280] To be a constitutionally adequate substitute for a warrant, the regulatory statute must perform the two functions of a warrant: it must advise the owner of the commercial premises that the search is made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.[281]

In his dissent, Justice Brennan disagreed with the majority on three issues. First, Justice Brennan argued that the vehicle dismantling industry was not a closely regulated industry in New York.[282] Second, Justice Brennan asserted that even if vehicle dismantling were a closely regulated industry, the search violated the fourth amendment because the administrative statute that allowed the search was not an adequate substitute for a warrant and thus failed to satisfy the third prong of the Court's reasonableness test.[283] Third, Justice Brennan argued that the fundamental defect of the statute permitting the warrantless administrative search was that it authorized searches intended solely to uncover evidence of criminal acts.[284]

Justice Brennan correctly observed that the Supreme Court in *New York v. Burger* made a significant move away from the traditional constitutional requirement that a warrant is required to conduct an administrative search of a commercial business.[285] The reasons upon which the Supreme Court based its determination that vehicle dismantling qualifies as a closely regulated industry would classify most businesses as closely regulated. Moreover, the relative ease with which the questionable statutory scheme passed the Court's three-part reasonableness test leaves little doubt that warrantless administrative searches conducted pursuant to statutory authority will receive minimal scrutiny by the Supreme Court. Furthermore, the Supreme Court's decision that the search was constitutional notwithstanding numerous indications that it was conducted solely to uncover evidence of criminal activity sets a dangerous precedent in the area of administrative searches. The Supreme Court's decision in *New York v. Burger* signals the end of meaningful fourth amendment protections for owners and operators of commercial businesses.[286]

The first step toward determining that a warrantless administrative search is reasonable within the fourth amendment is a finding that the business subject to the search is part of a closely regulated industry.[287] The rationale underlying the closely regulated business exception to the warrant requirement is based on a theory of privacy expectations.[288] The theory is that a person who chooses to engage in a heavily regulated industry

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[278] *Id.* at 2644.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.* at 2652 (Brennan, J., dissenting).
[283] *See id.* at 2654 (Brennan, J., dissenting).
[284] *Id.* at 2655 (Brennan, J., dissenting).
[285] *Id.* at 2652 (Brennan, J., dissenting).
[286] *Id.* at 2657 (Brennan, J., dissenting).
[287] *See id.* at 2646.
[288] *Marshall*, 436 U.S. at 313.

has, in effect, consented to governmental regulations.[289] The converse, however, is also true. If a person does not work in a closely regulated industry, his or her expectations of privacy are high and a warrantless administrative search of his or her business would violate the fourth amendment's prohibition against unreasonable searches. Therefore, the definition of "closely regulated" is crucial because a ruling that a business is in a closely regulated industry is the first step toward determining that a warrantless administrative search of that business is constitutionally permissible.[290]

The Supreme Court made two dubious arguments supporting its conclusion that the automobile dismantling industry was a closely regulated industry. First, the Supreme Court asserted that such regulatory requirements as record-keeping and licensing established the vehicle dismantling industry as closely regulated.[291] Second, the Court stated that the vehicle dismantling industry was closely regulated by virtue of its close association to a similar industry that has long been subject to close regulation — the general junkyard industry.[292]

The Supreme Court's holding that the bare administrative scheme in *Burger* qualified the vehicle dismantling industry as closely regulated was inconsistent with its earlier decisions. Previously, the Court granted an exception to the warrant requirement for administrative searches only when the industry to be searched either had a long tradition of being subject to close government regulation, or involved an inherent or immediate danger to health or life.[293] Furthermore, the *Dewey* Court explained that although historical supervision may help establish that close regulation of an industry exists, it is the pervasiveness and regularity of regulation that ultimately determines whether a warrant is necessary to render an administrative inspection scheme constitutionally permissible.[294] Justice Brennan compared the regulations in *Dewey* to those in *Burger* and correctly noted that, in stark contrast to the close regulation of mining in *Dewey*, no regulations governed the condition of work, the hours of work, the equipment to be used, or the methods of operation in the vehicle dismantling industry.[295]

Justice Brennan repeatedly emphasized that the vehicle dismantling industry was not pervasively regulated in New York.[296] Nonetheless, the *Burger* Court concluded that the automobile dismantling industry was a closely regulated industry because an operator must obtain a license, pay a fee, and maintain a police book.[297] Justice Brennan appropriately pointed out in his dissent, however, that if the mere requirement of a filing fee and a license were sufficient to place a business into the closely regulated business category, few businesses could escape this classification.[298] Justice Brennan explained

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[289] *Id.*

[290] *See Burger*, 107 S. Ct. at 2646.

[291] *Id.* at 2644–45.

[292] *Id.* at 2646.

[293] *Id.* at 2652 (Brennan, J., dissenting); *see Dewey*, 452 U.S. 594 (1981) (allowed warrantless inspection of mining organization because the mining industry is one of the most dangerous industries in the United States); *Biswell*, 406 U.S. 311 (1972) (permitted warrantless search of gun dealer's business because government regulation of the firearm industry is of central importance in preventing violent crimes); *Colonnade*, 397 U.S. 72 (1970) (permitted warrantless search of a liquor establishment because this industry has been closely regulated since 1692).

[294] *Dewey*, 452 U.S. at 606.

[295] *Burger*, 107 S. Ct. at 2653 (Brennan, J., dissenting).

[296] *Id.* at 2652 (Brennan, J., dissenting).

[297] *Id.* at 2644–45.

[298] *Id.* at 2653 (Brennan, J., dissenting). See the licensing and regulatory requirements described

that New York, like many states and municipalities, imposed very similar and often more comprehensive requirements on countless trades and businesses.[299] Therefore, the registration and record-keeping requirements can not justify characterizing an industry as closely regulated unless almost all industries are to be characterized as such.[300] Accordingly, Justice Brennan correctly argued that the vehicle dismantling industry in New York should not be characterized as closely regulated.

The Supreme Court's second argument supporting its determination that vehicle dismantling is a closely regulated industry was based on its decision to link two separate industries together.[301] Unlike the liquor industry in *Colonnade*, vehicle dismantling does not have a long history of close governmental regulation.[302] This is the traditional requirement to qualify an industry as closely regulated.[303] The Court, however, linked the automobile dismantling industry to the general junkyard industry and, thereby, carried over to the dismantling industry the general junkyard's long history of governmental regulation.[304]

This classification by association, which was central to the Supreme Court's determination that the vehicle dismantling industry was closely regulated, is tenuous. If one accepts the Court's reasoning, then any industry that is arguably related to a closely regulated industry itself becomes classifiable as a closely regulated industry. Moreover, because so many industries are by necessity interdependent, this reasoning, if carried to its logical end, would establish most industries as closely regulated either because of their own regulation or because of some association to a closely regulated industry. Therefore, because of this fertile ground for confusion, the Court should clarify what standards it will use to determine when an industry will be deemed closely regulated merely due to its interdependence with other industries that are considered closely regulated.

Following the Supreme Court's determination that vehicle dismantling was a closely regulated industry, it held that the statute satisfied the Court's three-part test, thereby making the warrantless search reasonable within the meaning of the fourth amendment.[305] The first prong of the test, requiring the state to have a substantial government interest in regulating the industry, was clearly satisfied. Automobile dismantlers provide a major market for stolen vehicles and, therefore, a state may rationally believe that regulations involving record-keeping and licensing may help reduce car theft.[306] Justice

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in NEW YORK CITY, N.Y., ADMIN. CODE § B32-1.0 (1977 and Supp.1985) (exhibitors of public amusement or sport); § B32-22.0 (motion picture exhibitions); § B32-45.0 (billiard and pocket billiard tables); § B32-46.0 (bowling alleys); § B32-54.0 (sidewalk cafes); § B32-58.0 (sidewalk stands); § B32-76.0 (sight-seeing guides); § B32-93.0 (public carts and cartmen); § B32-98.0 (debt collection agencies); § B32-135.0 (pawnbrokers); § B32-138 (auctioneers); § B32-167.0 (laundries); § B32-183.0 (locksmiths and keymakers); § B32-206.0 (sales); § B32-251.0 (garages and parking lots); § B32-267.0 (commercial refuse removal); § B32-297.0 (public dance halls, cabarets, and catering establishments); § B32-311.0 (coffeehouses); § B32-324.0 (sight-seeing buses and drivers); § B32-352.0 (home improvement business); § B32-467.0 (television, radio, and audio equipment, phonograph service, and repairs); § B32-491.0 (general vendors); § B32-532.0 (storage warehouses), *cited in Burger*, 107 S. Ct. at 2653 n.5 (Brennan, J., dissenting).

[299] *Burger*, 107 S. Ct. at 2653 (Brennan, J., dissenting).

[300] *Id.*

[301] *Id.* at 2646.

[302] *Id.* at 2645. See *supra* notes 133–138 and accompanying text for a discussion of *Colonnade*.

[303] *Burger*, 107 S. Ct. at 2652 (Brennan, J., dissenting).

[304] *Id.* at 2646.

[305] *Id.*

[306] *Id.* at 2647.

Brennan pointed out, however, that the majority has weakened the limitations on the closely regulated industries category by permitting officers to proceed without a warrant merely upon a showing of "substantial" state interest, instead of a showing of "urgent" state interest.[307] In *Biswell*, the Supreme Court stated that a warrantless administrative inspection may proceed where the regulatory inspection furthers an "urgent" government interest.[308] Therefore, although the state clearly has a substantial interest in regulating the vehicle dismantling industry, the Court's decision to lower the standard from "urgent state interest" to a "substantial state interest" may very well have the effect of increasing the number of businesses that will be subject to warrantless administrative searches.

The second prong of the Court's three-part test, requiring the warrantless inspection to be necessary to further the regulatory scheme, was less clearly satisfied. The Court stated that the situation in *Burger* was similar to the situation in *Dewey* and *Biswell*.[309] The *Burger* Court, using the same language as it had in *Biswell*, stated that frequent and unannounced inspections were essential and that the prerequisite of a warrant would frustrate inspections.[310] The *Burger* Court stated that because stolen cars pass quickly through automobile junkyards, frequent and unannounced inspections were necessary, and the surprise element was crucial, if the regulatory scheme were to function effectively.[311] Although the *Camara* Court stated that "warrants should normally be sought only after entry is refused," the Court in its companion case, *See*, implied that this procedure is not always necessary.[312] In *See*, the Court indicated that this rule does not necessarily apply in the area of business inspections "since surprise may often be a crucial aspect of routine inspections of businesses."[313] In *Marshall*, the Court raised this issue and intimated, in dicta, that inspectors could avoid losing the surprise element by simply regularly obtaining an administrative warrant prior to arriving at a business to conduct an inspection.[314] Because warrants may be issued *ex parte* and executed without delay and without prior notice, the element of surprise may always be retained.[315] In *Marshall*, the argument against the warrant requirement consisted of a concern for the administrative strain on the inspection system and the strain on the courts.[316] The *Marshall* Court, however, stated that it was unconvinced that requiring a warrant would impose serious strains on the inspection system or the courts.[317] Therefore, although the *Burger* Court adamantly stated that warrantless administrative inspections were essential in order to ensure the surprise element necessary to further the regulatory scheme, its reasoning was unconvincing due to the fact that nothing prevents officers from obtaining a warrant prior to an inspection.[318] Moreover, even if an inspector were to proceed without a warrant and were refused entry to conduct an inspection, the *ex parte* nature of the

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[307] *Id.* at 2654 n.7 (Brennan, J., dissenting).
[308] *Id.*; *see Biswell*, 406 U.S. at 317.
[309] *Burger*, 107 S. Ct. at 2648.
[310] *Id.*
[311] *Id.*
[312] *Camara*, 387 U.S. at 539; *See*, 387 U.S. at 545 n.6.
[313] *See*, 387 U.S. at 545 n.6.
[314] *Marshall*, 436 U.S. at 316, 317 n.12.
[315] *Id.* at 316.
[316] *Id.*
[317] *Id.*
[318] *Id.*

warrant application ensures that the inspector could retain the surprise element by merely returning unannounced to conduct the inspection accompanied by a warrant.[319]

The third prong of the Court's test, requiring that the statute authorizing the warrantless inspection is a constitutionally adequate substitute for a warrant, was not satisfied in *Burger*. To be a constitutionally adequate substitute for a warrant, the regulatory scheme must perform the two basic functions of a warrant.[320] First, it must advise the business owner that the search is authorized by the law and that it has a properly defined scope.[321] Second, it must limit the discretion of the inspecting officers.[322] In order to perform the first function, the statute authorizing the warrantless search must be so comprehensive and defined that a business owner could not help but be aware that his or her property would be inspected periodically for specific reasons.[323] In order to perform the second function of a warrant, the regulatory statute must be "carefully limited in time, place, and scope."[324]

The New York statute permitting the warrantless administration search of automobile dismantling businesses, section 415-a5 of the New York vehicle and traffic laws, performed neither of the two basic functions of a warrant. The statute did not put a business owner on notice that his or her property will be subject to inspections.[325] As Justice Brennan noted, a business owner has no assurance that any inspections will ever occur.[326] Section 415-a5 differs significantly in this respect from the statute in *Dewey* which specifically defined the frequency of inspections.[327] The statute in *Dewey* required that all surface mines be inspected at least twice a year, and all underground mines be inspected at least four times a year.[328] As the Supreme Court stated in *Dewey*, inspections may not be so "random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials."[329] Therefore, the statute in *Burger* failed to perform the first basic function of a warrant, which is to place a business owner on notice.[330] Accordingly, the statute failed to provide a constitutionally adequate substitute for a warrant.[331]

Moreover, section 415-a5 did not sufficiently limit the discretion of the inspecting officers, and thereby failed to satisfy the second element necessary to establish it as a constitutionally adequate substitute for a warrant.[332] The *Burger* Court stated that to limit the discretion of the inspecting officers, the statute must carefully limit the time, place, and scope of a search.[333] The Supreme Court in *Burger* held that the statute sufficiently limited the time of permissible searches because officers could only conduct

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[319] *See id.* at 319–20.
[320] *Burger*, 107 S. Ct. at 2644.
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.* at 2654 (Brennan, J., dissenting).
[326] *Id.*
[327] *Dewey*, 452 U.S. at 596.
[328] *Id.*
[329] *Id.* at 599.
[330] *See Burger*, 107 S. Ct. at 2654 (Brennan, J., dissenting).
[331] *Id.*
[332] *Id.* at 2654 (Brennan, J., dissenting).
[333] *Id.* at 2644.

inspections during regular business hours.[334] The Court held that the statute sufficiently limited the place because inspections could only be made at vehicle dismantling businesses and related industries.[335] Lastly, the Supreme Court held that the permissible scope was sufficiently narrow because the inspectors were permitted to examine only the records and the vehicles and parts that were subject to the record-keeping requirements of the statute.[336]

The New York statutory scheme, however, provided neither limits nor guidance concerning the selection of vehicle dismantlers for inspection.[337] This lack of guidance, argued Justice Brennan, was precisely why the Court declared the statutory scheme in *Marshall* unconstitutional.[338] As Justice Brennan pointed out in his dissent, the statute's only limitation was that the inspections must be conducted during business hours.[339] The statute's scope included all vehicles and parts subject to the record-keeping requirement which the statute defined as all vehicles that were purchased for later sale, i.e., every vehicle or part in the junkyard.[340] Therefore, this statutory scheme provided unguided discretion to police officers and thereby it is precluded from being an acceptable substitute for a warrant.[341]

In contrast to this statute, a warrant would provide a vehicle dismantler with the assurance that a neutral and detached judicial officer has found that the inspection is reasonable under the Constitution, that it is authorized by statute, and that it is conducted pursuant to a regulatory scheme containing neutral and specific criteria.[342] Moreover, a warrant would advise the owner, prior to inspection, of the scope and objects of the search, beyond which the inspector may not proceed.[343] Denying these important functions of a warrant in favor of granting officers unbridled discretion in conducting warrantless searches undermines the integrity of the fourth amendment.

The Supreme Court in *Burger* stated that the administrative scheme set forth in section 415-a5 was not unconstitutional merely because it had the same ultimate purpose as certain penal laws, which was to reduce car theft.[344] The Court emphasized that a state may address a major social problem such as car theft both by way of an administrative scheme and through a penal sanction.[345] Justice Brennan, however, correctly noted the increasing overlap of administrative and criminal violations and argued that section 415-a5 was unconstitutional because it authorized searches intended solely to uncover evidence of criminal acts.[346] It is well established that a state may not use an administrative inspection scheme as a pretext to search for criminal violations.[347] In

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[334] *Id.* at 2648.
[335] *Id.*
[336] *Id.*
[337] *See id.* at 2654 (Brennan, J., dissenting).
[338] *Id.* See *supra* notes 153–176 and accompanying text for a discussion of *Marshall.*
[339] *Burger*, 107 S. Ct. at 2655 (Brennan, J., dissenting).
[340] *See id.* at 2648.
[341] *Id.* at 2655 (Brennan, J., dissenting).
[342] *See Marshall*, 436 U.S. at 323.
[343] *Id.*
[344] *See Burger*, 107 S. Ct. at 2649.
[345] *Id.*
[346] *See id.* at 2655, 2657 (Brennan, J., dissenting).
[347] *Id.* at 2655 (Brennan, J., dissenting).

Camara, the Court stated that public interest would not justify a sweeping search of a city in hope of uncovering stolen goods.[348] A search for stolen goods, the *Camara* Court stated, is reasonable only when supported by probable cause that the stolen items will be found in a particular dwelling.[349]

Justice Brennan argued that the state used the administrative scheme as a pretext to search, without probable cause, for evidence of criminal violations.[350] Justice Brennan correctly noted that when Mr. Burger told the police that he was not registered to dismantle vehicles as required by section 415-a1, and that he did not have a police book as required by section 415-a5(a), he had violated every requirement of the administrative scheme.[351] Therefore, because there is no administrative provision forbidding possession of stolen vehicles, the search became one solely for evidence of criminal acts because all the administrative violations had already been uncovered.[352]

By failing to comply with the administrative requirements, a vehicle dismantler has already violated every element of the regulatory scheme and thus no further administrative search can be conducted.[353] Justice Brennan explained, however, that a vehicle dismantler can not circumvent the administrative scheme and escape inspection by simply failing to register or to keep records.[354] Rather, if the state chooses to conduct a search for evidence of criminal violations, the police need only obtain a criminal search warrant and then conduct a search.[355] If failure to register and to keep required records are sufficient to amount to probable cause, the officers will be able to obtain a criminal search warrant.[356] An officer, Justice Brennan asserted, could choose to remain on the premises to ensure that the vehicle dismantler does not conduct any further business while the other officers leave to go obtain a warrant.[357] For these reasons, Justice Brennan argued, a vehicle dismantler would not be able to thwart enforcement efforts by merely failing to comply with the statute.[358]

Therefore, because the administrative search in *Burger* could not have uncovered any further administrative violations, it was a search for evidence of criminal activity and this requires a warrant based upon probable cause.[359] Although the Supreme Court in *Burger* properly reasoned that a state may address a major problem both by way of an administrative scheme and a penal sanction, the state may not be permitted to circumvent the requirements of the fourth amendment.[360] The requirements of the fourth amendment are violated when a state is allowed to use an administrative scheme as a pretext to search without probable cause for evidence of criminal violations.[361]

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[348] *Camara*, 387 U.S. at 535; *see also Burger*, 107 S. Ct. at 2655 & n.11 (Brennan, J., dissenting).
[349] *Camara*, 387 U.S. at 535; *see also Burger*, 107 S. Ct. at 2655 & n.11 (Brennan, J., dissenting).
[350] *Burger*, 107 S. Ct. at 2656 (Brennan, J., dissenting).
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] *See id.*
[355] *Id.*
[356] *Id.* at 2656–57 (Brennan, J., dissenting).
[357] *Id.* at 2657 (Brennan, J., dissenting).
[358] *See id.* at 2656 (Brennan, J., dissenting).
[359] *See id.*
[360] *See id.* at 2657 (Brennan, J., dissenting).
[361] *See id.* at 2656 (Brennan, J., dissenting).

Conclusion

The Supreme Court's holding in *New York v. Burger* significantly reduces fourth amendment protections for owners of commercial enterprises by rendering virtually meaningless the general rule that a warrant is required for an administrative search of a commercial business. Because the Supreme Court found pervasive regulation where there was almost no regulation at all, and careful guidance where the police had almost complete unchecked discretion, the result and likely impact of this case will be that the warrant requirement will become the clear exception to the rule in the realm of administrative searches of commercial businesses.

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